Supreme Court, U.S.
FILED
001000 DEC 18 2000
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

BE-HUU NGUYEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Section 1231(a)(1) of Title 8 of the United States Code provides that when an alien has been ordered removed from the United States, the Attorney General shall remove the alien within 90 days. Section 1231(a)(2) requires the detention during the 90-day removal period of aliens who have been found removable based on a conviction for an aggravated felony. Section 1231(a)(6) then provides, in relevant part, that an alien who is removable for having committed an aggravated felony or "who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3)." 8 U.S.C. 1231(a)(6) (Supp. IV 1998). The question presented is:

Whether the Attorney General is authorized to continue to detain an alien beyond the 90-day removal period under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) if the alien cannot be removed immediately from the country but the Attorney General has determined that the alien would pose a risk of flight or danger to the community if released and the alien's custody is subject to periodic administrative review.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	4
Argument	8
Conclusion	9
Appendix A	1a
Appendix B	3a

TABLE OF AUTHORITIES

Cases:

Ma. v. *Reno*, 208 F.3d 815 (9th Cir.), cert. granted, 121 S. Ct. 297 (2000)	7, 8
Zadvydas v. *Underdown*, 185 F.3d 279 (5th Cir. 1999), cert. granted, 121 S. Ct. 297 (2000)	8

Statutes:

8 U.S.C. 1231(a) (Supp. IV 1998)	2-3
8 U.S.C. 1231(a)(1)(A) (Supp. IV 1998)	2, 7
8 U.S.C. 1231(a)(6) (Supp. IV 1998)	3, 6, 7, 8
8 U.S.C. 1251(a)(1)(B) (1994)	4
8 U.S.C. 1251(a)(2)(A)(iii) (1994)	4
8 U.S.C. 1251(a)(2)(B)(i) (1994)	4
28 U.S.C. 2241	7

In the Supreme Court of the United States

NO.

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

BE HUU NGUYEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Immigration and Naturalization Service (INS), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The orders of the court of appeals (App., *infra*, 1a-2a) and the district court (App., *infra*, 3a-4a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1231(a) of Title 8 of the United States Code provides in relevant part:

> **Detention and removal of aliens ordered removed**
>
> **(a) Detention, release, and removal of aliens ordered removed**
>
> **(1) Removal period**
>
> **(A) In general**
>
> Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").
>
> * * * * *
>
> **(2) Detention**
>
> During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.
>
> **(3) Supervision after 90-day period**
>
> If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General.

The regulations shall include provisions requiring the alien—

(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

* * * * *

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. 1231(a) (Supp. IV 1998).

STATEMENT

1. a. Respondent is a native and citizen of Vietnam. Alien file A25062082 (A-file) 480. He entered the United States as a refugee on July 16, 1980. *Ibid.* On March 17, 1982, he adjusted his status to lawful permanent resident. *Ibid.*

On April 14, 1995, the INS served respondent with an order to show cause, charging him with being subject to deportation from the United States under 8 U.S.C. 1251(a)(1)(B) (1994), for entering the United States without inspection, and under 8 U.S.C. 1251(a)(2)(B)(i) (1994), because he had been convicted of a controlled substance offense. A-file 93-96. The controlled substance charge was based on respondent's conviction in state court on February 6, 1990, of possession of cocaine base. Respondent had been arrested after he was observed conducting drug transactions within 1000 feet of a school and showed an undercover officer two pieces of cocaine. *Id.* at 490. Respondent was sentenced to two years' imprisonment. *Id.* at 93-96, 320. On May 4, 1995, the INS lodged an additional charge of deportability against respondent, charging that he was subject to deportation under 8 U.S.C. 1251(a)(2)(A)(iii) (1994), because he had been convicted of an aggravated felony based on a second controlled substance conviction. A-file 86-87. The INS later dropped the charge of entering the United States without inspection. *Id.* at 91.

On June 16, 1995, an immigration judge found that respondent was subject to deportation as charged and ordered that respondent be removed to Vietnam. A-file 81. Respondent did not appeal that order to the Board of Immigration Appeals, and thus his deportation order became final. *Id.* at 142.

b. At the time of his incarceration on his 1990 drug conviction, respondent had "accrued sixteen misdemeanors and two Felonies for vehicle and drug related offenses." A-file 490; see also *id.* at 255-256. On September 28, 1993, respondent was convicted in state court on a robbery charge, for which he was sentenced to three years' imprisonment. *Id.* at 248. When respondent was paroled from that sentence in April 1995 (*id.* at 281, 410), he was transferred to INS custody for his removal proceedings and detained on a $10,000 bond. *Id.* at 100, 142. While in INS custody, respondent was disciplined for assaulting another detainee. *Id.* at 11-13. Respondent was released by INS under an order of supervision on January 24, 1997. *Id.* at 217, 301. At the same time, he also remained on parole under his state sentence.

Respondent repeatedly violated his parole conditions over the course of the next year, by using drugs, failing to report to parole authorities, absconding, and providing false identification to a police officer. A-file 275, 277. Respondent also failed to report to the INS office as directed by his order of supervision on April 1, 1997. *Id.* at 218, 299. Ultimately, the parole office recommended that respondent be evaluated by the prison board, and respondent was recommitted to state custody on September 24, 1997. *Id.* at 276, 281. The parole office described respondent as having "an extensive criminal history dating back to 1987 which includes the following: Vehicular Hit and Run, multiple arrests for Under the Influence of Controlled Substance, multiple arrests for Possession Controlled Substance, Vehicle Theft, Cocaine for Sale, False Identification to Peace Officer, Disorderly Conduct, and Robbery." *Id.* at 276. It further explained that respondent had violated his parole conditions several times,

had a history of absconding from parole supervision, "and additionally a parole investigation has revealed that [respondent] is involved in serious organized criminal activity." *Ibid.*

Respondent was re-released from his state imprisonment term in February 1998 and transferred to INS custody. A-file 142, 241, 281. On February 2, 1999, respondent was again released by the INS under an order of supervision. *Id.* at 142, 189. On July 23, 1999, respondent was arrested and charged with possession of stolen property. *Id.* at 164, 169. On July 26, 1999, respondent was convicted in state court of being under the influence of a controlled substance and sentenced to 180 days' imprisonment. *Id.* at 164, 166. The INS lodged a detainer against respondent (*id.* at 164) and, after completion of his state imprisonment term, respondent was again transferred to INS custody on November 18, 1999. *Id.* at 142, 164.

c. On February 2, 2000, the INS requested travel documents for respondent from the consulate of Vietnam. A-file 142. The Vietnamese government has not responded to the request, and therefore the INS has been unable to effectuate respondent's removal. App., *infra*, 3a. The INS continued to detain respondent under 8 U.S.C. 1231(a)(6) (Supp. IV 1998), subject to periodic administrative review of his custody. On December 3, 1999, the INS notified respondent that it would be reviewing his custody status, informed him of the factors that would be considered in making the custody determination, and explained that respondent could submit whatever documentation he wished to be considered. A-file 161. On February 17, 2000, the INS informed respondent that he would be continued in INS detention at that time and his custody would be reviewed again in six months. *Id.* at 140. The INS noted

respondent's criminal history and the fact that, on each previous occasion when the INS released respondent under an order of supervision, respondent violated those conditions by committing another crime. *Id.* at 146. It also noted respondent's failure to submit letters of family support or prospective employment and his failure to demonstrate any rehabilitation. *Ibid.* The INS concluded that respondent posed a threat and danger to people and property in the community if released. *Ibid.*

2. a. Meanwhile, on February 15, 2000, respondent had filed a petition for habeas corpus relief under 28 U.S.C. 2241 in the United States District Court for the Eastern District of California, challenging the constitutionality of his continued detention. App., *infra*, 3a.

b. On April 10, 2000, the Ninth Circuit issued its decision in *Ma* v. *Reno*, 208 F.3d 815, holding that the INS lacked authority as a statutory matter under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) to detain an alien beyond the initial 90-day removal period described in 8 U.S.C. 1231(a)(1)(A) (Supp. IV 1998), notwithstanding that the Attorney General had continued to detain the alien because he posed a risk to the community, the alien's detention was subject to periodic administrative review, and the country to which the alien was ordered removed (Cambodia) is engaged in ongoing negotiations with the United States concerning a process for the return of its nationals ordered removed by the INS. The Ninth Circuit in *Ma* did not reach the constitutional grounds on which the district court had relied.

c On May 5, 2000, the district court entered an order in this case granting respondent's habeas corpus petition and directing the INS to release respondent from custody subject to reasonable restrictions. App., *infra*, 4a. The district court summarily ruled that,

under the court of appeals' decision in *Ma*, respondent was entitled to habeas corpus relief. *Id.* at 3a-4a.

d. On September 18, 2000, the court of appeals entered an order summarily affirming the district court's judgment in this case on the basis of its decision in *Ma*. App., *infra*, 1a-2a.

ARGUMENT

This case presents the question whether the Attorney General is authorized to continue to detain an alien beyond the initial 90-day removal period under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) if the alien cannot be removed immediately from the United States but the Attorney General has determined that the alien would pose a risk of flight or danger to the community if released and the alien's custody is subject to periodic administrative review. The court of appeals summarily affirmed the judgment of the district court in light of its holding in *Ma* v. *Reno*, 208 F.3d 815 (9th Cir. 2000), that the INS lacks such authority.

On October 10, 2000, this Court granted the petition for a writ of certiorari in *Reno* v. *Ma*, 121 S. Ct. 297, to review that decision of the Ninth Circuit. On the same date, the Court also granted the petition for a writ of certiorari in *Zadvydas* v. *Underdown*, 121 S. Ct. 297, to review a decision of the Fifth Circuit (185 F.3d 279 (1999)) that rejected a constitutional challenge to continued detention under Section 1231(a)(6), without questioning the statutory authority of the Attorney General to detain an alien in such circumstances. Because the question presented in this case is already before the Court in *Ma* and *Zadvydas*, the petition for a writ of certiorari should be held pending the Court's decisions in those cases.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decisions in *Reno* v. *Ma*, No. 00-38, and *Zadvydas* v. *Underdown*, No. 99-7791, and then be disposed of as appropriate in light of the decisions in those cases.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DECEMBER 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-16287
DC# CV-00-320-WBS
Eastern California
(Sacramento)

BE HUU NGUYEN, PETITIONER-APPELLEE

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT-APPELLANT

[Filed: Sept. 18, 2000]

ORDER

Before: WALLACE, BEEZER and FERNANDEZ, Circuit Judges

Appellant's renewed motion to stay proceedings in this appeal is denied.

A review of appellant's response to the court's August 11, 2000, order to show cause indicates that the questions raised in this appeal are so insubstantial as not to require further argument. *See Ma v. Reno*, 208 F.3d 815 (9th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3086 (U.S. July 5, 2000) (No. 00-38); *United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (per curiam).

Accordingly, we summarily affirm the district court's judgment.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CIV S-00-0320 WBS

BE HUU NGUYEN, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

[Filed: May 5, 2000]

ORDER

Petitioner is an individual in the custody of the Immigration and Naturalization Service (INS) proceeding through counsel with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2241.

Petitioner is a former lawful permanent resident who was ordered deported to Vietnam. This order became final on June 16, 1995. He was most recently taken back into INS custody on November 18, 1999. Petitioner has not been deported , but instead has remained in INS custody beyond the 90 day "removal period" set out in 8 U.S.C. § 1231, because the United States has no functioning repatriation agreement with Vietnam, and the Vietnamese government does not presently accept the return of its nationals from the United States.

On April 10, 2000, the United States Court of Appeals for the Ninth Circuit issued its decision in *Ma*

v. Reno, No. 99-35976 (9th Cir. April 10, 2000). In that decision, the Court held that:

> the INS lacks authority under the immigration laws, and in particular under 8 U.S.C. § 1231(a)(6), to detain an alien who has entered the United States for more than a reasonable time beyond the normal ninety day statutory period authorized for removal. More specifically, in cases like Ma's, in which there is no reasonable likelihood that the alien will be removed in the reasonably foreseeable future, we hold that it may not detain the alien beyond that statutory removal period.

Id., slip op. at 3964. Under *Ma v. Reno*, Petitioner is entitled to habeas relief.

Accordingly, IT IS HEREBY ORDERED that:

1. Petitioner's application for a writ of habeas corpus is granted;

2. Respondent's request for a stay of release of Petitioner pending the Ninth Circuit's vote on whether to hear *Ma v. Reno en banc* is denied;

3. Respondent shall release Petitioner from incarceration, subject to such reasonable restrictions set forth in 8 U.S.C. § 1231(a)(3) that the Attorney General may place on Petitioner, by Monday, May 8, 2000, at 12:00 noon.

Dated: May 4, 2000.

/s/ WILLIAM B. SHUBB
HON. WILLIAM B. SHUBB
Chief United States District Judge